

Served: February 10, 1992

NTSB Order No. EA-3483

**UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 22nd day of January, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

SE-9575

ROBERT C. MASON,

Respondent.

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins issued in this proceeding on August 11, 1989, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision the law judge affirmed in part an order of the Administrator which alleged that respondent, the holder of an airline transport pilot certificate, violated section 61.59(a)(2) of the Federal Aviation Regulations ("FAR"),

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

14 C.F.R. part 91,<sup>2</sup> by falsifying two FAA Forms 8410-3, Airman Competency/Proficiency Checks, by indicating that he had supervised the satisfactory completion of VOR<sup>3</sup> approaches by two airmen during recurrent flight checks, when the approaches had not been performed. While finding that respondent falsified the forms, the law judge ruled that a 60 day suspension was nonetheless a more appropriate sanction than revocation. The Administrator asserts on appeal that the modification of sanction was erroneous.<sup>4</sup> We agree.

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. For the reasons that follow, we will grant the Administrator's appeal and reinstate the sanction of revocation.

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<sup>2</sup>FAR section 61.59(a)(2) provides as follows:

"§61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports or records.

(a) No person may make or cause to be made....

(2) Any fraudulent or intentionally false entry in any logbook, record or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance or exercise of the privileges, or any certificate or rating under this part..."

<sup>3</sup>"VOR" means very high frequency omnirange station. FAR §1.2

<sup>4</sup>Respondent has filed a brief in reply.

Respondent does not dispute that he indicated on the Forms 8410-3 that both airmen had satisfactorily performed VOR approaches when in fact they had not.<sup>5</sup> However, he asserts that since both airmen used the VOR as a "back-up" while performing other types of approaches during their flight checks, he could properly give them "dual credit" for both types of approaches. We concur with the law judge's implicit credibility finding against respondent, and we agree with his conclusion that respondent knew at the time he prepared the forms that the information he placed on the forms regarding VOR approaches was false.<sup>6</sup>

Respondent also claimed that he never intended to deceive the FAA since he knew both airmen were competent to perform VOR approaches because of his many years of experience flying with both of them, and because, as check airman for their employer, Friendship Air Alaska, he had given both of them most of their recurrent flight checks and had previously observed their satisfactory performance. The law judge found, based on this

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<sup>5</sup>The discrepancy was discovered by an FAA inspector who, while reviewing the forms, noticed that the flight checks were completed in less than 1.1 hours. The inspector knew from his own experience that it was unlikely that the applicants completed all the required maneuvers in so short a period of time. When confronted by the inspector, respondent admitted the applicants had not performed a VOR approach.

<sup>6</sup>The law judge correctly noted that a VOR approach could not be performed by the airmen since a VOR approach plate had not been used during their flight checks and because air traffic control never cleared them for VOR approaches.

testimony, that respondent did not falsify the forms with the intent to commit fraud. He thereupon determined that the falsification was not "flagrant" and resulted in only a "technical" FAR violation, and in light of respondent's 25,000 hours of flying experience and violation-free history he modified the sanction to a 60-day suspension.

The Administrator argues on appeal that respondent's falsification of the forms evidences a lack of qualifications which requires revocation of his airman certificate. He asserts that since the law judge affirmed the FAR violation, any reduction in sanction must be justified by clear and compelling reasons, citing Administrator v. Musquiz, 2 NTSB 1474 (1975) and its progeny. Respondent urges the Board to affirm the initial decision, arguing that a suspension is appropriate since, even though the law judge affirmed the FAR violation, he found only that intentional falsification and not fraud had been established,<sup>7</sup> and relying on language in the case Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976) for the proposition that falsification, as a lesser included offense of fraud,<sup>8</sup> is

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<sup>7</sup>The complaint alleged fraud or intentional falsification, but the law judge found that only intentional falsification had been established. The Administrator has not appealed that finding.

<sup>8</sup>The court noted in Hart that the elements of fraud are (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation. Id. at 522, citing Pence v. United States, 316 U.S. 332, 338 (1942). An intentional false statement requires proof of only the first three elements, and is a lesser included offense. Id.

deserving of a lesser sanction.<sup>9</sup>

The Board has previously considered the court's analysis in Hart v. McLucas which suggests that there is some sort of a sliding scale for sanction which may depend on the degree of culpability as established by the elements proven by the Administrator in a case prosecuted under FAR section 61.59. See Administrator v. Cassis, 4 NTSB 555, 557 (1982), aff'd Cassis v. Helms, 737 F.2d 545 (6th Cir. 1984). The regulation provides for the sanction of suspension or revocation for either fraud or falsification,<sup>10</sup> and we have consistently held that the falsification of any FAA form or logbook used to demonstrate compliance with a certification or rating requirement warrants revocation, regardless of whether that falsification was intended to deceive the FAA.<sup>11</sup> Moreover, we reject respondent's arguments that the airmen's actual proficiency to perform VOR approaches is relevant as to the sanction assessed for respondent's violation.

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<sup>9</sup>The court in Hart suggests in dicta that "[T]he specification of fraud serves to indicate that there are varying degrees of culpability under §61.59(a)(2) and that such degrees of culpability are to be considered in the choice of punishment." Id. at 524.

<sup>10</sup> See FAR §61.59(b).

<sup>11</sup>See, e.g., Administrator v. McCarthney, et al., NTSB Order No. EA-3245 at 6 (1990), where we reaffirmed our belief that even one intentional falsification compels the conclusion that the falsifier lacks the necessary care, judgment and responsibility required to hold any airman certificate. Administrator v. Fallon, NTSB Order No. EA-2678 (1988) was a rare instance where the Board affirmed a sanction less than revocation. In that case, unlike the case sub judice, the respondent admitted his false entries to the Administrator before he was under investigation.

It does not matter if they are actually competent to perform VOR approaches, or if respondent could "trust them" to do so, as he claims in his reply brief. Our focus is on respondent's qualifications to hold an airman certificate, not theirs, and our conclusion is that because respondent could not truthfully and accurately prepare the forms, the aviation system can no longer trust him to properly exercise the privileges of his airman certificate.<sup>12</sup> As we noted in Cassis, "[t]he maintenance of the integrity of the system of qualification for airman certification, which is vital to aviation safety and the public interest, depends directly on the cooperation of the participants and on the reliability and accuracy of the records and documents maintained and presented to demonstrate compliance." 4 NTSB at 557.

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<sup>12</sup>Respondent asserts that his military career (he is a retired Air Force colonel) and vast aviation experience (25,000 hours) should be considered in mitigation. In the Board's view an airman with this much experience should know better than to deliberately falsify an FAA form.

**ACCORDINGLY IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The initial decision, except as to sanction, and the Administrator's revocation order, except as to the allegation of fraud, are affirmed; and
3. The revocation of respondent's airline transport pilot certificate shall begin thirty days after service of this order.<sup>13</sup>

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>13</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).